IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

GUADALUPE M. MORADO, CONCEPTION ALANIZ, MAX GAYTAN, RAUL VILLARREAL, RENE A. SOLIS, SANTIAGO CLARKE, FEDERICO PILON, AND HEBERTO BARRERA, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on January 12, 1972.

OPINION BELOW

The opinion of the Court of Appeals is printed in Appendix A hereto, *infra*, page 1a. It has not yet been reported. No written opinion was handed down by the Court of Appeals in connection with its action denying the petition for rehearing.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1972, Page 17a, *infra*. Rehearing was denied on February 1, 1972. Page 18a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the District Court had jurisdiction under 18 U.S.C. Sec. 241 to convict petitioners of conspiracy to accomplish federal-candidate vote dilution in the May 1970 Democratic primary in Starr County, Texas where the only evidentiary foundation for the jury's inferring the claimed conspiracy consisted of election activities of petitioners not shown by evidence to have related to any vote that would be or was voted for a federal candidate.

STATUTE INVOLVED

The statute involved is 18 U.S.C. Sec. 241. Such statute is set out in Footnote 1, *infra*.

STATEMENT OF THE CASE

Petitioners were convicted of conspiring, in violation of 18 U.S.C. Sec. 241,[1] to produce federal-candidate vote dilution in the May 1970 Democratic primary election in Starr County, Texas and thereby injure the constitutional right[2] of each qualified voter who cast a federal-candidate vote to have that vote given full effect.[3]

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[1] 18 USC. Sec. 241 provides, in pertinent part, as follows:

> If two or more persons conspire to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . they shall be fined not more than $10,000 or imprsoned not more than ten years or both.

[2] The right of a voter to have his vote for a *federal* candidate counted and given full effect is one secured by the Constitution and hence is protected by 18 U.S.C. Sec. 241. *United States* v. *Saylor*, 322 U.S. 385 (1944); *United States* v *Classic*, 313 U.S. 299 (1941).

[3] The indictment allegations under which petitioners were tried are printed in Appendix D. Page 19a. *infra*.

Originally, there were 22 defendants. One was severed in limine due to illness; nine were acquitted by judgment of acquittal; four were granted a mistrial due to inability of the jury to agree; and the remaining eight were found guilty by the verdict and sentenced by the trial court. Those eight defendants were appellants in the appeal taken to the Court of Appeals. That Court affirmed as to six of them and reversed and remanded as to the other two. All of those eight defendants are now petitioners in this Court for writ of certiorari, seeking a reversal of the judgment of each court below and the rendition by this Court of judgment acquitting each of them.

Petitioners seek review of the question whether the evidence was (as each court below held) or was not (as petitioners claim) sufficient to take to the jury the conspiracy element of the Government's case. Petitioners raised that issue by motion for judgment of acquittal at the close of the evidence (I. R. 24) and by similar motion after verdict (I. R. 25).

The Government's proof tended to show the following:

(1) That there were 12 absentee votes the jury could infer were invalid due to Texas Election Code violations committed by petitioners in relation to those votes; and

(2) That in the election there were 345 *valid* absentee votes evidenced by voting papers showing on their face that as to each of the voters who cast those votes various ones of the petitioners did acts relating to the voter's voting absentee, e.g. the act of executing medical certificate, the act of execut-

ing notary certificate, or the act of being witness to the signature mark of the voter;[4] and

(3) That four letters petitioner Dr. Rene A. Solis had purporting to have been received from voters asking him to examine them so they could get a medical certificate to vote absentee were fictitious.

Though a permissible deduction from that proof was that petitioners' election activities were the product of concert between petitioners, there was an undisputed circumstance which kept that proof from constituting a valid basis for a jury finding that petitioners conspired to achieve the specific object alleged by the indictment, i.e. the object of producing federal-candidate vote dilu-

[4] Although the Government did not challenge the legality of any of these 345 votes, and although the trial court expressed the opinion that such votes had not been shown to be illegal (III R. 345), nevertheless that court, over defense objections (III R. 345, 352), admitted into evidence before the jury the absentee voting papers applicable to each of those votes, such papers being G-Exs. 1-15, and such papers showing on their face that various ones of the petitioners did acts in relation to such votes not shown by the Government to have been other than innocent, e.g. the act of executing medical certificate, the act of executing notary certificate, or the act of being witness to the signature mark of the voter. The action of the Government in adducing proof as to those papers and in claiming that that proof is evidentiary as to the issue whether petitioners criminally conspired as alleged in the indictment finds a counterpart in the Apalachin trial, where the conduct of a group of persons in meeting together for a purpose not shown by the Government to be other than innocent was given an appearance of criminality sufficient to cause the Jury to find a criminal conspiracy. *United States* v. *Buffalino*, 285 F.2d 408 (2d Cir. 1960).

tion through the means of causing invalid absentee votes to be cast.

That circumstance was this, that those activities were not shown to have related to any vote that would be or was voted for a federal candidate.[5]

Because of that circumstance no conspiracy the jury permissibly might have inferred from those activities could possibly have included the federal-candidate vote dilution object alleged by the indictment.

The jury properly could have inferred that petitioners conspired as alleged only if there had been proof sufficient to establish prima facie either the hypothesis that they *actually* diluted one or more federal-candidate votes or the hypothesis that they *attempted* to do so or the hypothesis that they *planned* to do so.

But there was no proof raising any of those hypotheses.

In the Court of Appeals petitioners contended that the Government, though not required to prove any particular one of those hypotheses, was bound to prove at least one of them and that since it wholly failed to prove any of them it did not make out its prima facie case.

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[5] There was neither live testimony nor documentary evidence tending to show that any voter with whom petitioners were connected voted for any federal candidate. No such voter testified to having voted for any federal candidate and no ballot of any such voter was ever produced to show a vote for any federal candidate. Nor was there any testimony tending to show that petitioners at any time ever solicited any such voter to vote for any federal candidate.

That Court's response to that contention consisted only of a brief discussion of the rule which specifies that it is not mandatory that the Government in a federal conspiracy case prove the hypothesis that the conspiracy succeeded.[6]

REASONS FOR GRANTING THE WRIT

A conspiracy with reference to invalid absentee votes that would be or were voted only for non-federal candidates would be outside the allegations of the indictment because without capacity to injure the particular right the indictment says petitioners conspired to injure, to wit, the right of qualified voters who voted for *federal* candidates to have their votes for *those* candidates counted and given full effect.

Thus, the only possible invalid absentee votes that could have relevance or materiality in this prosecution are invalid absentee votes that would be or were voted for *federal* candidates.

This being true, it follows that an indispensable condition of the Government's raising a jury issue as to

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[6] It has always been the rule in federal conspiracy cases that the Government is not required to show that the claimed conspiracy succeeded in order to raise a jury issue as to existence of such conspiracy. *United States* v. *Rabinowich*, 238 U.S. 78 (1914). Because of that rule the Government in the present prosecution was not required, as a condition of raising a jury issue as to the conspiracy element of its case, to adduce proof showing that petitioners actually accomplished the federal-candidate vote dilution the indictment charges they conspired to accomplish. But proof of that kind, if available to the Government, constituted a legitimate means of raising such a jury issue, this being true because of the familiar principle that what is done is good proof of what was agreed to be done. *Young* v. *United States*, 48 F.2d 26, 27 (5th Cir. 1931). The Government, by omitting proof of that kind, merely put itself under the burden of adducing some other appropriate evidence from which the conspiracy element of its case might be inferred by the jury. No such other evidence will be found in the record.

the conspiracy element of its case was the production of proof sufficient to show at least prima facie that invalid absentee votes concerning which petitioners conspired would be or were voted for federal candidates.

That condition was not met.

The Government left the record silent as to the issue whether invalid absentee votes concerning which petitioners allegedly conspired would be or were voted for federal candidates. For aught that appears from the record, petitioners' election activities may have related entirely to votes that would be or were voted only for non-federal candidates.

Such being the condition of the record, we submit that to sanction the use of 18 U.S.C. Sec. 241 as a device to prosecute petitioners for those activities is to sweep within the orbit of federal power matters of purely State concern, contrary to the proper division of law enforcement responsibilities between the State and the Federal Government.

If those activities, consisting as they do of conduct not shown to have been related to any vote that would be or was voted for any federal candidate, can invoke federal jurisdiction under 18 U.S.C. Sec. 241, there appears to be no limitation to the scope of that jurisdiction.

We submit that it is important to the proper administration of criminal justice in the federal courts for this Court to define the appropriate limitations upon the use of 18 U.S.C. 241 for the prosecution of election activities unrelated to federal-candidate votes.

CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

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